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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1960

No. 621

WALTER A. BERTRAND,
Petitioner,
vs.
SOUTHERN PACIFIC COMPANY,
a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
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Walter A. Bertrand, plaintiff in the United States District Court for the Northern District of California, Southern Division, appellant in the United States Court of Appeals for the Ninth Circuit, petitions for a writ of certiorari to the latter court, to review its decision affirming a judgment on a verdict for defendant in the District Court.

OPINION OF LOWER COURT.

The opinion of the Court of Appeals of the Ninth Circuit appears at R. 235. This is the only opinion in the lower courts. It is reported at 282 F.2d 569.

JURISDICTIONAL STATEMENT.

The judgment of the United States Court of Appeals for the Ninth Circuit was rendered and entered September 13, 1960. The appellant's Petition for Rehearing was denied October 13, 1960. (R. 242.) A copy of the opinion of the Court of Appeals is attached as Appendix "A" to this petition; a copy of the judgment as Appendix "B"; a copy of the order denying the petition for rehearing is attached as Appendix "C". The Supreme Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

The following questions are presented for review:

(1) Does the rule that an appellate court will notice plain error (though insufficiently assigned in the trial court) apply in civil cases under the Rules of Civil Procedure?

(2) May the appellate court consider an assignment of error (under Rules of Civil Procedure 46 and 51) on a point made clear to the trial court and the opposing party (though informally assigned) where nothing in the record indicates that any further ex-

position would have induced the trial court to change its legal position?

(3) Are objections to an instruction given sufficiently set forth by an opposite instruction requested by the appellant and refused by the court?

(4) In the exercise of its supervisory power over the lower federal courts, this court should direct the Court of Appeals of the Ninth Circuit to notice plain error.

STATUTES AND RULES INVOLVED.

1. Federal Safety Appliance Act relating to handbrakes—45 U.S.C. 11;

2. Federal Rules of Civil Procedure, 46;

3. Federal Rules of Civil Procedure, 51;

4. The Federal Safety Appliance Act relating to couplers (45 U.S.C. 2) is the basis of one of the cases cited as authority.

The foregoing statutes and rules are quoted in Appendix "D" to the present petition.

STATEMENT OF THE CASE.

The Court of Appeals states the essential facts correctly at R. 235.

> "On July 3, 1957, while engaged in his duties as an employee of Southern Pacific, Bertrand attempted to release a brake on a freight car. The brake stuck and could not be released. Bertrand made a great exertion to turn the brake wheel,

and then felt a sharp pain going down his back and left leg. He reported the nonfunctioning brake to the car inspectors. As a result of this report and without testing the brake to see if it worked, a car inspector took the brake apart thereby releasing it."

The trial court told the jury that while failure of the brake to work permitted a finding for the plaintiff, it did not compel a finding. The trial court's exact language appears at R. 224:

> "Now, in this case the burden of proof is upon the plaintiff to prove the hand brake was not an efficient hand brake. Various kinds of evidence could be introduced in that field. It is the law, however, that evidence that the brake did not work when applied in the usual and normal manner *is sufficient* to prove the inefficiency of the brake. *It doesn't mean that it is compelling evidence.* You can consider all of the evidence in the case and *you are free to conclude one way or another* from all of the evidence *whether there was an efficient hand brake or not.* However, the evidence that it did not work *is sufficient* evidence upon which to base a conclusion that the brake was inefficient." (Italics added.)

(On the merits, it is plaintiff's position that this instruction involves the same error as that in *O'Donnell v. Elgin J. & E. Ry. Co.*, 338 U.S. 384.)

The plaintiff had previously filed a trial memorandum of authorities to the effect that failure of equipment to work was itself an actionable wrong (Plaintiff's Trial Memorandum, R. 13-15); and had re-

quested instructions to the same effect, which the District Judge had refused to give. (Requests 6 and 7, R. 18, 19; not included in charge given, R. 220-229.) In a conference in chambers before the jury were instructed, defense counsel took the position that a handbrake might be efficient under 45 U.S.C. 11 even though it did not work. (R. 217, 218.) At the end of this conference in chambers (R. 219), plaintiff's counsel made the objection which the opinion quotes at R. 237.

The Court of Appeals held that objections to the quoted instruction had not been sufficiently preserved in the trial court under Rules of Civil Procedure 46 and 51; and that the Ninth Circuit does not now recognize the rule of noticing plain error in civil cases.

JURISDICTION OF LOWER COURTS.

The District Court of the Northern District of California had jurisdiction under 28 U.S.C. 1331 and 1391(c).

The Court of Appeals for the Ninth Circuit had jurisdiction under 28 U.S.C. 1291 and 1294(1).

REASONS FOR GRANTING WRIT OF CERTIORARI.

I. CONFLICT AMONG CIRCUITS AS TO APPLICABILITY OF PLAIN ERROR RULE IN CIVIL CASES (FIFTH, DISTRICT OF COLUMBIA CIRCUITS).

A. The Court of Appeals squarely takes the position that it disagrees with the Fifth Circuit as to

whether the plain error rule applies in civil litigation at R. 238. It says:

> "Appellant has called our attention to Louisiana & Arkansas Railway Company v. Moore, 5 Cir., 229 F.2d 1, 3, in which the refusal of the court to give a requested instruction was considered on the merits, despite the fact that no objection was made in the trial court. The court held that 'since it [the question] goes to the central issue in the case . . . we may consider it under the general rule which allows an appellate court to notice plain errors, although they are not properly excepted to below.'
>
> "Whatever the rule may be elsewhere, in this circuit the 'plain error' rule may not be utilized in civil appeals to obtain a review of instructions given or refused, where the ground asserted was not raised in the trial court. Hargrave v. Wellman, 9 Cir., 276 F.2d 948, 950."

As indicated, *L. & A. Ry. Co. v. Moore,* 229 F.2d 1, 3, involved claimed error in instructions in an FELA case. It, therefore, arises from the same branch of law as the present case. The only difference is that in *L. & A. Ry. v. Moore,* it was claimed that an instruction was erroneously refused; whereas, here, it is claimed that an instruction was erroneously given. There is a direct conflict between the two circuits as to whether the plain error rule may be applied in civil cases.

In *Montgomery v. Virginia Stage Lines,* 191 F.2d 770, 774, the District of Columbia Circuit likewise held the plain error rule applicable to instructions in a civil case.

B. In its earlier case of *Hargrave v. Wellman,* 276 F.2d 948, 950, the Ninth Circuit had based its refusal to notice "plain error" in civil cases upon the circumstance that the Federal Rules of Criminal Procedure have a special rule on the point (Crim. Rule 52(b), 18 U.S.C.A.), while the Civil Rules have no specific provision one way or the other. But, the criminal rules were enacted *after* the civil rules so furnish no guide to their meaning. (Civil Rules 1938, Civ. Rule 86(a); Criminal Rules, 1945, Crim. Rule 59.)

C. Before the promulgation of the rules, the appellate courts noticed "plain error" in civil as well as criminal cases; *Board of County Commissioners v. Home Savings Bank,* 236 U.S. 101, 103-4; *U.S. v. La Franca,* 282 U.S. 568, 571.

Before adoption of the Rules of Civil Procedure, some of the circuits had local rules under which they noticed plain error in civil cases. *U. S. v. Harris,* 79 F.2d 341, 342 (C.C.A. 9); *Swiss Bankverein v. Zimmermann,* 240 F. 87, 92 (C.C.A. 2).

The Rules of Civil Procedure are silent upon the question. Silence of a statute (or its equivalent) does not, of course, alter existing case law. Complete silence on a matter previously governed by case law points even less toward an intention to change pre-existing law than statutes which have been held not to work an implied repeal. (e.g. *FTC v. A.P.W. Paper Co.,* 328 U.S. 193, 202; *Posadas v. City Natl. Bank,* 296 U.S. 497, 504, 505.)

II. COURT OF APPEALS MISAPPLIED PALMER v. HOFFMAN, 318 U.S. 109.

The statement of facts shows that court and counsel had extensively discussed the question whether failure of the brake to work compelled or merely permitted a finding of liability. All parties understood what the issue was, and the trial court adopted the view urged by the defendant.

At R. 237 the Court of Appeals says:

> "Objections to a charge 'must be sufficiently specific to bring into focus the precise nature of the alleged error'. Palmer v. Hoffman, 318 U.S. 109, 119".

But the opinion in *Palmer v. Hoffman*, 318 U.S. 109, includes a qualification, which leads to the opposite result in the present case. The full text of the passage at 318 U.S. 109, 119, is as follows:

> "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. *Where a party might have obtained the correct charge* by specifically calling the attention of the trial court to the error, and where part of the charge was correct, he may not through a general exception obtain a new trial". (Italics added.)

The discussion among court and counsel, and plaintiff's requested instructions which the court had refused to give (R. 18, 19—requests 6 and 7) show that the trial court in effect ruled upon an issue of law when it gave the instruction as it did. (R. 224.) *There is nothing in the record to suggest that a formal*

exception would have induced the court to change its position. Accordingly, under the language of *Palmer v. Hoffman,* 318 U.S. 109, 119, the Court of Appeals should have reviewed the point on the merits.

III. CONFLICT BETWEEN CIRCUITS AS TO WHETHER INSTRUCTIONS REFUSED CONSTITUTE OBJECTION TO INSTRUCTION GIVEN. (DISTRICT OF COLUMBIA CIRCUIT.)

As the Court of Appeals notes at R. 237, appellant requested, and the District Court declined to give two instructions which stated the plaintiff's position (R. 18, 19) and which are opposed to the instruction which the court did give. (R. 224.) The Ninth Circuit holds that these requests do not serve the purpose of objections when the court finally gives a contrary charge:

> R. 237: "Reference is also made to two of his proposed instructions not given by the court in which, it is argued, the correct rule is stated. No objection was taken to the failure to give these proposed instructions, nor is it here argued that failure to give those specific instructions was error. . . .
>
> R. 238: "We hold that having failed in the trial court to object to the giving of the questioned instruction by stating distinctly the matter to which he objects and the grounds of his objection. appellant is precluded from obtaining a review thereof in this court. Hargrave v. Wellman, supra."

In short, the Ninth Circuit holds that plaintiff's two refused requests (6 and 7, R. 18, 19) do not serve the

purpose of pointing out objections to the charge as given.

In this, the Ninth Circuit conflicts with the decision of the District of Columbia Circuit in *Montgomery v. Virginia Stage Lines,* 191 F.2d 770.

There the Court of Appeals of the District Court of Columbia said (p. 773):

> "A few moments prior to argument to the jury counsel for plaintiff stated 'If your Honor please, I have some special prayers which I would like to present.' The court responded, 'Submit your instructions in writing and I will pass upon them.' There ensued a brief discussion about the time likely to be consumed in argument. Then, as the transcript indicates, the arguments were made, followed by a short recess, whereupon the court instructed the jury. It does not appear when the requested instructions were submitted or acted upon, except that they bear the notations to which we have referred [pp. 771-2] dated the last day of the trial. *If they were submitted after the charge was made, or if they had been previously submitted and were pending and unacted upon when the charge was completed, objection to their denial should be deemed to have been made after the charge, reading Rule 51 with Rule 46.*" (Italics added.)

Since the instructions given and the requests refused in the case at bar were opposite statements of the same point, any objections which "should be deemed to have been made" must apply equally to both. In holding that the refused requests 6 and 7 were not effective at least as pointing out the objection to the

charge given, the decision of the Ninth Circuit is essentially in conflict with that of the District of Columbia.

IV. IN EXERCISE OF SUPERVISORY POWER THIS COURT SHOULD DIRECT NINTH CIRCUIT COURT OF APPEALS TO NOTICE PLAIN ERROR.

This Court exercises supervisory power over the procedure of the lower federal courts. (*Thiel v. Southern Pacific Co.*, 328 U.S. 217, 225.) To abolish the rule of noticing plain error would introduce a procedural rigidity into appeals which has not existed before. We submit that the Fifth Circuit is perfectly sound in saying that when the chief issue (or a chief issue) is presented in the form of disputed instructions, it will be noticed as plain error just the same as if presented in any other form. (*L. & A. Ry. Co. v. Moore*, 229 F.2d 1, 3.)

By the same logic, the disputed instruction on the present appeal presents a case of plain error, and this Court in the exercise of its supervisory power, should direct the Ninth Circuit Court of Appeals to consider it on its merits.

V. CONCLUSION.

It is respectfully submitted that for the foregoing reasons the writ of certiorari should be granted.

Dated, San Francisco, California,
December 20, 1960.

Respectfully submitted,
ROBERT R. HEPPERLE,
GEORGE OLSHAUSEN,
By GEORGE OLSHAUSEN,
Attorneys for Petitioner.

(Appendices "A", "B", "C" and "D" Follow.)

Appendix "A"

United States Court of Appeals for the Ninth Circuit

WALTER A. BERTRAND, *Petitioner,* vs. SOUTHERN PACIFIC COMPANY, a corporation, *Respondent.*	No. 16,576 Sept. 13, 1960

Appeal from the United States District Court for the Northern District of California Southern Division

Before: Orr, Hamley and Koelsch, Circuit Judges

HAMLEY, Circuit Judge:

Walter A. Bertrand, plaintiff in this action for damages brought under the Federal Safety Appliance Act and the Federal Employers' Liability Act, 45 U.S.C.A. §§ 1 et seq., 51 et seq., appeals from a judgment for defendant, Southern Pacific Company. The judgment rendered after a jury trial conforms to the verdict. The specifications of error question the giving of two instructions and the refusal to give several instructions proposed by appellant.

Evidence favorable to appellant on the question of liability tended to establish the facts set out below.

On July 3, 1957, while engaged in his duties as an employee of Southern Pacific, Bertrand attempted to release a brake on a freight car. The brake stuck and could not be released. Bertrand made a great exertion to turn the brake wheel, and then felt a sharp pain going down his back and left leg. He reported the nonfunctioning brake to the car inspectors. As a result of this report and without testing the brake to see if it worked, a car inspector took the brake apart thereby releasing it.

Appellant's principal specification of error challenges the giving of an instruction relating to the effect which the jury should give to evidence that the brake did not work when applied in the usual and normal manner. The jury was told that such evidence is sufficient to prove inefficiency of the brake. The jury was further instructed, however, that this does not mean that it is "compelling" evidence. The jury was advised that it could consider all of the evidence in the case and would be free to conclude "one way or another from all the evidence, whether there was an efficient hand brake or not." Appellant contends that the jury should have been told that the failure of the brake to work "compels" a finding of violation of the act.

Appellee argues that we cannot consider this specification of error because appellant failed to comply with Rule 51, Federal Rules of Civil Procedure, 28 U.S.C.A. This rule provides in part:

> "... No party may assign as error the giving or the failure to give an instruction unless he objects

thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

After all of the instructions were given, appellant was afforded an opportunity to object, out of the hearing of the jury, to the instructions given and refused. No objection was made at that time to the instruction referred to above. Appellant, however, refers to certain events which occurred prior to the giving of the instructions and urges that an objection within the meaning of Rule 51 may be derived therefrom. In this connection chief reliance is placed upon a remark made by counsel for appellant during a colloquy in chambers between the court and opposing counsel while the matter of instructions was under consideration but before they had been formulated by the trial judge.[1]

During this discussion the judge stated that he would instruct "somewhat along this line," then describing the substance of the instruction later given which appellant now challenges. The judge added, however, that he would give the instruction in a little more detail than he had then stated "so that the various steps are clear." After some further discussion counsel made the following remark, which is relied upon as raising the objection now being urged:

---

[1]While a court reporter was present and recorded most of this conversation in chambers, the court directed that part of the conversation be off the record, and this was done.

> "There's simply the additional item, your Honor, that proof of specific defect is not required. That ties in with your Honor's statement about the failure of the brakes to function."

Considered separately or in context with all the discussion which preceded it, this remark did not in our view "distinctly" state the matter to which appellant here objects, as required by Rule 51. Only by broadest inference does the remark even relate to the objection to the instruction now being urged. To say that a plaintiff need not provide proof of a specific defect is hardly a forthright way of saying that proof of failure of the brake to work compels a finding of violation of the act. Objections to a charge "must be sufficiently specific to bring into focus the precise nature of the alleged error." Palmer v. Hoffman, 318 U. S. 109, 119.

Nor was the quoted remark referenced to any final form of instruction given or proposed to be given as contemplated by Rule 51. The court had merely outlined in general terms the scope of the proposed instruction, and counsel had notice that the instruction had not yet taken final form.

Appellant also draws attention to a trial memorandum which he had submitted to the court at the outset of the trial. In this memorandum certain cases are cited which, appellant argues, establish the incorrectness of the instruction now under attack. Reference is also made to two of his proposed instructions not given by the court in which, it is argued, the correct rule is stated. No objection was taken to the failure

to give these proposed instructions, nor is it here argued that failure to give those specific instructions was error.

The trial court is not required to rummage through trial briefs and proposed instructions in an effort to discover potential objections to instructions not yet given or formulated. Rule 51 provides the procedures to be followed. These procedures are not mere technicalities. Rule 51 is designed to bring possible errors to light while there is still time to correct them without entailing the cost, delay and expenditure of judicial resources occasioned by retrials.

Reading together Rule 46[2] and 51 as appellant asks us to do, it may be concluded that objections to the giving or the failure to give instructions need not follow any particular form. Rule 46, however, does not undermine the provision of Rule 51 that whatever the form of the objection it must at least state distinctly the matter to which objection is taken and the grounds for the objection. As indicated above the remarks in chambers, notations in the trial memorandum, and proposed instructions failed in both of these particulars.

---

[2]Rule 46, Federal Rules of Civil Procedure, 28 U.S.C.A., reads as follows:

"Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

Appellant has called our attention to Louisiana & Arkansas Railway Company v. Moore, 5 Cir., 229 F. 2d 1, 3, in which the refusal of the court to give a requested instruction was considered on the merits despite the fact that no objection was made in the trial court. The court held that "since it [the question] goes to the central issue in the case . . . we may consider it under the general rule which allows an appellate court to notice plain errors, although they are not properly excepted to below."

Whatever the rule may be elsewhere, in this circuit the "plain error" rule may not be utilized in civil appeals to obtain a review of instructions given or refused, where the ground asserted was not raised in the trial court. Hargrave v. Wellman, 9 Cir., 276 F. 2d 948, 950.

We hold that having failed in the trial court to object to the giving of the questioned instruction by stating distinctly the matter to which he objects and the grounds of his objection, appellant is precluded from obtaining a review thereof in this court. Hargrave v. Wellman, supra.

Appellant's second specification of error pertains to the refusal of the court to give the proposed instruction No. 8, quoted in the margin.[3]

---

[3] "Under this act of Congress, the test of liability of the railroad carrier [that is, the defendant, Southern Pacific] is simply whether the proofs justify with reason the conclusion that the employer's negligence [in this case the failure to furnish an efficient hand brake] played any part, even in the slightest, in producing the injury for which damages are sought. It does not matter that from the evidence the jury may also with reason on grounds of probability attribute the result to other causes including the employee's contributory negligence."

The proposed instruction paraphrases in part language to be found in Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 506. The court in that case, however, was not speaking of "the test of liability of the railroad carrier" (the language used in the proposed instruction) but "the test of a jury case." If the proofs justify with reason the conclusion that employer negligence played any part, "even the slightest," in producing the injury or death, then the issue of causal relation must go to the jury. The Supreme Court was here using the word "proofs" to mean "evidence." But the fact that the proofs or evidence justify with reason a finding of causal relation does not mean that the jury is required to make such a finding.

The proposed instruction is faulty because it bound the jury to find what it was entitled to find but was not required to find. It is also faulty in that it injected the issues of negligence and contributory negligence which are no part of a Safety Appliance Act case. Rogers v. Elgin, Joliet & Eastern Ry. Co., 7 Cir., 248 F.2d 710. The court gave an instruction on causal relation. If it was inadequate or erroneous in any respect appellant should have objected thereto. No such objection was taken. The court did not err in failing to give proposed instruction No. 8.

Under appellant's third specification of error the failure of the court to give appellant's proposed instruction No. 9 is brought into issue. Under this proposed instruction the jury would have been told that it should "disregard assumption of risk and contributory negligence."

Appellee's answer to the complaint pleaded the defense of contributory negligence. Since, however, the action was brought only under the Federal Employers' Liability Act and the Safety Appliance Act, and was predicated upon an asserted violation of statute, neither contributory negligence nor assumption of risk (not pleaded) were defenses. 45 U.S.C.A. §§ 53, proviso clause, 54. The trial judge in his instruction to the jury made no mention of negligence, contributory negligence or assumption of risk. There is nothing to indicate that appellee's answer pleading contributory negligence went to the jury room. In the absence of the jury counsel for appellant advised the court that "there is no point in having any issue of negligence in the submission to the jury at all."

In view of the circumstances to which reference has been made, the failure of the court to give appellant's proposed instruction No. 9 was not prejudicial error.

The next specification of error relates to the question of damages. It is argued that the court erred in failing to give appellant's proposed instruction No. 19 on aggravation and in giving an instruction on this subject which appellant regards as inadequate.

No objection was taken to the failure to give No. 19. Appellant's only criticism of the instruction given on the subject is that it "was a very pale and watered down statement of the principle." This is not an adequate argument to warrant us in examining the matter. In any event no objection was taken to the court's instruction. For the reasons indicated this specification presents nothing for review here.

The last specification of error relates to the failure to give appellant's proposed instruction No. 20 on life expectancy.

Since the jury found against appellant either on the ground that there was no liability or no damage, any error in giving or failing to give an instruction on life expectancy could not be prejudicial.

Affirmed.

(Endorsed) Opinion Filed Sept. 13, 1960.

Frank H. Schmid, Clerk.

Appendix "B"

JUDGMENT.

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment. Filed and entered: September 13, 1960.

Frank H. Schmid, Clerk.

Appendix "C"

"Excerpt from Proceedings of Thursday, October 13, 1960. Before: Orr, Hamley and Koelsch, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING.

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellant, filed October 3, 1960, and within time allowed therefor by rule of court for a rehearing of the above cause be, and hereby is denied."

Appendix "D"

45 U.S.C.A. § 11. Safety appliances required for each car; when hand brakes may be omitted

"It shall be unlawful for any common carrier subject to the provisions of sections 11-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in said sections, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: *Provided,* That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose. Apr. 14, 1910, c. 160, § 2, 36 Stat. 298."

Rule 46. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a

ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Rule 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

45 U.S.C. § 2.

Automatic couplers.

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. Mar. 2, 1893, c. 196, §2, 27 Stat. 531."

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 621

WALTER A. BERTRAND,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

Respondent's Answer to Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 621

WALTER A. BERTRAND,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Respondent.

Respondent's Answer to Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

STATEMENT OF THE CASE

This is an action by the plaintiff, Walter A. Bertrand, against defendant, Southern Pacific Company, for personal injuries allegedly arising out of a claimed violation of Section 11 of the Federal Safety Appliance Act, 45 U.S.C., Section 11. The jury rendered a defense verdict and the trial court denied plaintiff's motion for a new trial. Plain-

tiff appealed from the judgment and the Ninth Circuit Court of Appeals affirmed the judgment in favor of defendant and denied appellant's petition for a rehearing. Plaintiff now petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, to review its decision affirming the judgment for defendant.

ARGUMENT

I. Each Circuit Court of Appeals May Adopt Its Own Rules of Procedure. The Rule of the Ninth Circuit on Plain Error Is Consistent with Rule 51 of the Federal Rules of Civil Procedure and the Rules of the United States Supreme Court.

Initially, we believe that there was no error committed in the instant case—plain or otherwise. Petitioner's principal contention in the Ninth Circuit and his sole point on this petition for a writ of certiorari is that the court erred in instructing the jury that whether the hand brake in question was an "efficient" one or not within Section 11 of the Federal Safety Appliance Act was one of fact for their determination. Respondent believes that this was a correct statement of the law. Petitioner, on the other hand, argues that the court should have told the jury that his testimony that the brake did not work compelled a finding of a violation of the Act. We submit that his contention, if accepted, would rewrite Section 11 so as to supplant the provision that hand brakes be "efficient" with a requirement that they operate upon each and every occasion. It would, moreover, not only render railroads absolutely liable for injuries proximately caused by violation of the Act, as provided for by the Act, but would preclude defendants from contesting that there had been a violation.

Plaintiff, in any event, failed to object to the court's instruction and the Ninth Circuit held that his failure to comply with Rule 51 of the Federal Rules of Civil Pro-

cedure precluded him from a review of that instruction on appeal. To overcome the lack of proper objection, plaintiff argued that the instruction constituted plain error which the Appellate Court should notice despite lack of objection to the instruction at the trial. The court refused to consider the instruction, citing Rule 51 and stating that the "plain error" rule may not be utilized in the Ninth Circuit in civil appeals to obtain a review of instructions given or refused, where the ground asserted was not raised in the trial court.

Petitioner's principal contention before this Court is that there is a conflict between circuits as to the applicability of the "plain error" rule in civil cases. He has cited *Louisiana & Arkansas Railway Co. v. Moore*, 229 F.2d 1 (5th Cir. 1956), and *Montgomery v. Virginia Stage Lines*, 191 F.2d 770 (D.C. Cir. 1951), where the courts did consider unobjected to error and has argued that these decisions conflict with the decision of the Ninth Circuit in the instant case.

What petitioner has failed to recognize, however, is that each circuit is free to adopt its own rules of procedure. There is no requirement that the rules of every circuit be the same. The statutory source of authority under which the Courts of Appeals promulgate their rules of procedure, 28 U.S.C. § 2071, provides simply:

> "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

This statute does not prohibit one circuit from adopting a rule which is in conflict with the rule followed by another circuit. Indeed, a casual reading of the United States Courts

of Appeals Rules, 28 U.S.C. Rules, indicates many areas of disagreement. In the Ninth Circuit, for example, under Rule 20, subd. 4, a case may be submitted without oral argument by either or both of the parties on briefs. In the Tenth Circuit, however, under Rule 20, subd. 6, if there is no appearance for either party at oral argument, the case may be dismissed at the cost of appellant.

At one time, the Ninth Circuit had a rule (Rule 11) by which the court, at is option, could consider a plain error in the record despite a failure to assign the error in appellant's brief. Rule 11, however, was omitted in the Revised Rules of the Ninth Circuit which became effective on December 19, 1938 and since then there has been no provision for consideration of "plain error" in civil cases in the Ninth Circuit. Similarly, the rules for the First, Second, Third, Sixth, Seventh, Eighth and Tenth Circuits contain no provision for consideration of plain error. Only the District of Columbia Circuit under its Rule 17(g), the Fourth Circuit under its Rule 10, subd. 8, and the Fifth Circuit under its Rule 24, subd. 2(b), have provided that the court in its discretion may consider plain error not objected to at trial or assigned by appellant in his brief. Any difference, therefore, between the decisions cited by petitioner and the opinion of the Ninth Circuit in the case at bar is merely a reflection of the difference, if any, in the rules of procedure for the various circuits.

As this Court stated in *Palermo v. United States*, 360 U.S. 343, 3 L.Ed. 2d 1287, 1296 (1959),

> "The power of the Supreme Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress."

Respondent submits that just as the Fifth Circuit is free to adopt a rule that it may, at its option, consider plain

error, so may the Ninth Circuit in its discretion decide to follow the line of cases which hold that Rule 51 of the Federal Rules of Civil Procedure is and should be strictly enforced by the courts. (See *Palmer v. Hoffman*, 318 U.S. 109, 87 L.Ed. 645 (1943); *Ditter v. Yellow Cab Co.*, 221 F.2d 894 (7th Cir. 1955); *Lang v. Rogney*, 201 F.2d 88, 98 (8th Cir. 1953).)

We believe that the position of the Ninth Circuit as expressed in the instant case is not inconsistent with any Act of Congress or rule of the Supreme Court. Rule 51 of the Federal Rules of Civil Procedure specifies that a party who assigns as error the giving of an instruction or the refusal of a requested instruction must have made a specific and distinct objection following the court's charge and before the jury retires to deliberate. He must have stated distinctly the matter to which he objects and provide the court with the grounds of his objection. The purpose for this requirement is to enable the trial court to correct its charge if it deems proper and necessary prior to *the jury's retirement* for deliberation. Failure to comply with Rule 51 constitutes a waiver by the non-objecting party.

The position of the Ninth Circuit, which is joined in by seven other circuits, is perfectly consistent with Rule 51. While petitioner in the instant case objected to the refusal of certain instructions which are not involved in this petition for a writ of certiorari, he made absolutely no objection whatsoever to the court's charge as given. The Ninth Circuit properly applied Rule 51 and held that appellant was precluded from obtaining a review of the instruction challenged for the first time on appeal by having failed in the trial court to object to the giving of the instruction.

Nor is the Ninth Circuit rule inconsistent with any rule of procedure adopted by the Supreme Court. In stating

this, we well recognize that this Court has provided in Rule 40, subd. 1(d)(2) that "the court, at its option, may notice a plain error not presented." We do not believe, however, that there is any inconsistency between the Supreme Court rule and that of the Ninth Circuit. The Supreme Court rule states that it is within the Supreme Court's discretion whether or not to notice a plain error which has not been presented. The Court may at its option refuse to consider error which has not been raised by the appellant even though it be plain error. It is purely a matter of discretion. Neither the Supreme Court rule nor the rules of the District of Columbia, Fourth and Fifth Circuits provide that the court must recognize plain error which has not been assigned. The Ninth Circuit in the case at bar has done nothing different from what any of the above courts, including this Court, may do under its own rules. It has, in its option, refused to consider a point which was not preserved through proper objection under Rule 51. Just as this Court, in its discretion, may refuse to notice a point not presented, the Ninth Circuit, in its discretion, has refrained from ruling on the instruction in question because of non-compliance with Rule 51 enacted by this Court.

Both the Fifth and District of Columbia Circuits have recognized that they may refuse to exercise their discretion and have done so in certain cases. In *Sinclair Refining Co. v. Howell*, 222 F.2d 637 (5th Cir. 1955), the court held that where the grounds upon which the appellant criticized the instruction were not assigned as required by Rule 51, it was not called upon to discuss the objection to the instruction. So too in *Madison v. Phillips*, 254 F.2d 348 (D.C. Cir. 1958), where appellant urged that the court could consider issues raised for the first time on appeal under the plain error rule, the court refused to do so, citing Rule 51 of the Federal Rules of Civil Procedure.

If this Court had stated in its rules that "the court shall notice a plain error not presented", there would be an inconsistency. Under such wording, this Court would not have any discretion. It would be obliged to consider error which constituted plain error despite lack of presentation. Under Rule 40, however, there is no inconsistency. Just as this Court may consider whether or not to recognize a plain error, so may the Circuit Court make that decision as it sees fit.

In *Hargrove v. Wellman*, 276 F.2d 948 (9th Cir. 1960), which is cited by the court in the instant case, the court pointed out that while the plain error rule is expressly made a part of the Federal Rules of Criminal Procedure (Rule 52(b), 18 U.S.C.) and is therefore held to complement Rule 30 of the Federal Rules of Criminal Procedure, requiring that the grounds of objection to an instruction be stated in the trial court, there is no plain error rule set forth expressly in the statute for civil appeals to complement Rule 51 of the Federal Rules of Civil Procedure. Petitioner's argument that since the criminal rules were enacted after the civil rules, they furnish no guide to their meaning, is fallacious. We submit that it is highly significant that this Court has not amended the Rules of Civil Procedure since 1945 when the criminal rules were enacted so as to include provision for plain error in civil cases. Moreover, we have already observed that the Ninth Circuit amended its rules in 1938 so as to drop the plain error rule at the same time that the Federal Rules of Civil Procedure went into effect. This was no mere coincidence. Indeed, the Ninth Circuit in 1938 provided in Rule 8 that "The Federal Rules of Civil Procedure, whenever applicable, are hereby adopted as part of the rules of this court." The deletion of former Ninth Circuit Rule 11 was in conformity with the provisions of Rule 51 of the Federal Rules of Civil Procedure.

(See in this regard, *Lynch v. Oregon Lumber Co.*, 108 F.2d 283 (9th Cir. 1939).)

The court's action in the case at bar is wholly consistent with Rule 51. In its discretion, it has refused to consider a point which appellant chose not to preserve in the trial court. Though appellant made several objections following the court's charge, he voiced no objection to the instruction which he attacked for the first time on appeal. His attempt to supply the missing objection through a conversation held in chambers on the day before the jury was instructed and a trial memorandum submitted at the commencement of trial was properly dismissed by the court as a desperate endeavor based on hindsight. Petitioner chose to let the instruction go in unchallenged; and, having done so, he waived the right to urge its error, if any existed. He now claims that his position concerning this instruction was clear from his trial memorandum and remarks in chambers. The Ninth Circuit clearly disagreed and, citing *Palmer v. Hoffman*, 318 U.S. 109, 87 L.Ed. 645 (1943), expressed considerable doubt whether appellant's position was ever made clear to the trial judge. Certainly, he made no objection to the refusal of two of his proposed instructions supposedly embodying what he claims is the proper rule.

One thing, however, is clear. If petitioner at that time knew his own position which he has advanced on appeal and was convinced of its propriety and nevertheless remained silent after hearing the court's charge, then truly he waived any objection to it by not complying with Rule 51. This would not be a case of inadvertence or oversight but one of express waiver. (*Johnson v. United States*, 318 U.S. 189, 87 L.Ed. 704 (1943), rehrg. den. 318 U.S. 801 (1943)) Having gambled and lost, he may not now claim prejudice. Under Rule 51, he is precluded from assigning error on

appeal and the Ninth Circuit properly declined to review the instruction in question.

II. The Ninth Circuit Properly Held that Under Rule 51 of the Federal Rules of Civil Procedure a Refused Requested Instruction to Which No Objection Was Taken Cannot Serve as an Objection to an Instruction Given.

Petitioner claims that two of his requested instructions which were not given constituted an objection to an instruction given by the court. But, as the Ninth Circuit points out in its opinion, petitioner made no objection concerning the court's failure to give these proposed instructions, nor did he contend on appeal that the court's failure to give those instructions was error. The court properly held that the unobjected to refusal of a proposed instruction cannot serve as the missing objection to another instruction.

An objection that a requested instruction was not given is not an objection to the charge as given and does not preserve the right to complain on appeal of the charge as given. (*Travelers Indemnity Co. v. Bengston*, 231 F.2d 263 (5th Cir. 1956)) Since that is so, we submit that it would be foolish to give an unobjected to refused instruction greater weight than one where an objection has been raised as to its refusal.

Montgomery v. Virginia Stage Lines, 191 F.2d 770 (D.C. Cir. 1951), cited by petitioner, does not conflict with the decision of the Ninth Circuit in the case at bar. In that case, the court simply stated that where the requested instruction was either made *after* the court's charge or *shortly prior* thereto, objection to its denial should be deemed to have been made after the charge. The case did not involve claimed error in the instructions as given. It only dealt with the refusal of a proposed instruction. Indeed, the court even distinguished *Palmer v. Hoffman*, 318 U.S. 109, 87 L.Ed. 645 (1943), where this Court held that a requested charge which

was not sufficiently discriminating did not bring into focus the precise nature of the alleged error and entitle the appellant to a new trial. The court also cited *Villaroman v. United States*, 184 F.2d 261 (D.C. Cir. 1950), where, even though appellant had objected to the refusal of his proposed instruction, it was held that sufficient objection had not been made to the actual charge.

The decision in *Montgomery v. Virginia Stage Lines*, supra, therefore, does not conflict with the opinion of the Ninth Circuit in the case at bar. If anything, it offers support for the decision herein. Petitioner did not object to the refusal of his requested instructions. He has never urged or assigned error in their refusal. He has never quoted them in any brief or shown in any way that they even covered the same point as his complaint to the charge as given. We agree with the Ninth Circuit:

> "The trial court is not required to rummage through trial briefs and proposed instructions in an effort to discover potential objections to instructions not yet given or formulated. Rule 51 provides the procedures to be followed. These procedures are not mere technicalities. Rule 51 is designed to bring possible errors to light while there is still time to correct them without entailing the cost, delay and expenditure of judicial resources occasioned by retrials."

III. Even Assuming That Plain Error Existed, the Instant Case Is Not One Where It Should Be Noticed.

In *O'Malley v. Cover*, 221 F.2d 156 (8th Cir. 1955), the court made a comment which we believe is particularly relevant to the case at bar. The court therein stated:

> "This is not one of those rare situations in which an appellate court, in the public interest and to prevent a miscarriage of justice, will notice a plain error not objected to at the trial." (221 F.2d 156, 159).

Even assuming *arguendo* that plain error existed, as contended by petitioner, we do not feel that it should be considered or noticed by the appellate court.

The only evidence that the brake did not work on this one occasion was the testimony to that effect by the plaintiff. Plaintiff, however, was impeached on a number of different points. He testified on direct examination that on the day of the "accident", July 3, 1957, before it took place, his physical condition was very good. (R. 108) He also testified that he had been working steadily. (R. 111) On cross-examination, he was asked if he had not in fact laid off sick during the six months period prior to the accident from January 1-14, January 24-31, February 2-3, February 14-28, March 3-6, April 5-May 20, June 13-15, and June 28-July 2, in addition to being off from March 21-March 31. (R. 114) He denied that this was correct. (R. 115) Summaries of his working record for 1957 were subsequently received in evidence and read to the jury, confirming that in 1957 up to the day of the "accident", he had laid off sick on the days above mentioned or for a total of 97 days out of the 183 days prior to June 3rd. (R. 204-205) When questioned concerning the numerous occasions that he had laid off sick, he stated that he didn't remember whether or not he had actually been sick on any of those times (R. 126-127) and explained, "You didn't necessarily have to be sick" to lay off sick when called. (R. 126)

The plaintiff, petitioner herein, thoroughly and completely lied about his injuries and the jury was not compelled to believe his testimony that the brake did not work. He was impeached on other particulars concerning his claim of injuries. Dr. William Holcomb, who was called by the defense, believed that the most reasonable explanation for the plaintiff's many complaints and present assumed

disability was his claim against his employer and that he would request to be returned to duty when his claim was terminated. (R. 181) Dr. Howard Black, who treated the plaintiff in 1956, before the "accident" in question, was of the opinion that plaintiff was a malingerer. (R. 192)

Under the state of the record in this case, we submit that it would not be in the interests of justice that a plain error be noticed, even if it existed. The jury's defense verdict was proper and just. Respondent respectfully requests that the petition for a writ of certiorari be denied.

CONCLUSION

The Ninth Circuit properly refused to consider claimed error in an instruction which was not objected to by appellant at the trial. It exercised its discretion and its ruling was in full compliance with the provisions of Rule 51 of the Federal Rules of Civil Procedure. The Ninth Circuit properly ruled that under Rule 51 a refused requested instruction to which no objection was taken and which had not been assigned as error on appeal cannot serve as an objection to an instruction given by the court. The jury's verdict was proper and just and should not be disturbed, even assuming the existence of error in the record. The Ninth Circuit properly affirmed the judgment in favor of defendant. Respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1960

No. 621

WALTER A. BERTRAND,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR CERTIORARI

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PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR CERTIORARI

1. Respondent argues (Reply p. 3):

> "What petitioner has failed to recognize, however, is that each circuit is free to adopt its own rules of procedure."

While this might be an argument on the merits (we show below that it is not), *it does not dissolve the conflict among the circuits.*

For all three circuits which have considered the point, decide it as a matter of general application.

a. The opinion below (Pet. Cert. App'x "A", p. vi) even while saying "whatever the rule may be else-

where" treats the question as of general application, not as one arising under a local rule. It relies entirely on its own earlier holding of *Hargrave v. Wellman,* 276 F.2d 948. *Hargrave v. Wellman* does not base its holding upon the repeal of former Ninth Circuit Rule 11, but upon the difference between the Civil and Criminal Rules of Procedure, upon Rule of Civil Procedure 51 and upon its still earlier holdings which it cites without comment. (The last reference is to *Flintkote Co. v. Lysfjord,* 246 F.2d 368, 388.)

The first case in the series is *Lynch v. Oregon Lumber Co.,* 108 F.2d 283, 286, which adverts to the repeal of old Ninth Circuit Rule 11, but then cites Rule of Civil Procedure 51 as controlling. The question is thus treated as one of general application. The same is true of the other Ninth Circuit cases cited in *Hargrave v. Wellman,* 276 F.2d 948, 950, n. 2. (*Siebrand v. Gossnell,* 234 F.2d 81, 96; *Persons v. Gerlinger Carrier Co.,* 227 F.2d 337, 343 (construing present Ninth Circuit Rule 18(2), requiring specification of objections made below, as supplementing Rule of Civil Procedure 51, and relying on case next cited).

Woodworkers Tool Works v. Byrne, 191 F.2d 667, 676—which relies entirely on Rule of Civil Procedure 51.

b. Likewise the Fifth and District of Columbia Circuits, in reaching a contrary result, do so as a matter of general law. Thus, the Fifth Circuit refers to "the *general rule* which allows *an appellate court* to notice plain errors, although they were not properly excepted to below". (*La. & Ark. Ry. Co. v. Moore,* 229 F.2d 1, 3.)

And the District of Columbia Circuit expressly decided the question as a matter of general law, *independently of its rule.* See *Montgomery v. Virginia Stage Lines,* 191 F.2d 770, 774.

> "We referred to the principle to this effect stated in our Rule 17(i). *This rule apart,* and we do not now construe it as applicable, the power set forth in the Shimabukuro case exists, though, as there held, it is sparingly to be exercised. While the error here may not be as serious as it was there, yet the duty of the carrier in relation to the suitcase is a central one to the case. As an alternative basis for our review of the error of the court in failing to instruct as to this duty, we rely upon our discretion to consider the matter, even if appellant could not require us to do so. Harlem Taxicab Ass'n. v. Nemesh, 89 U.S.App. D.C. ....., 191 F.2d 459." (Italics added.)

Consequently the circuits are in conflict on the question of reviewing plain error in civil cases. All treat it as a matter of general law, the holding of the Ninth Circuit being contrary to that of the Fifth and District of Columbia.

2. But respondent is mistaken when it says on page 4 of its reply that the Fifth and District of Columbia Circuits have rules governing their power to notice plain error not assigned in the trial court. We print the respective rules as an appendix to this reply. They are rules dealing with *points not mentioned in the briefs on appeal*—not with the problem of plain error *not preserved in the trial court.* The rule of the Fifth Circuit is unmistakable; if the rule of the District of

Columbia Circuit leaves any doubt, this doubt is removed by the language from *Montgomery v. Virginia Stage Lines,* 191 F.2d 770, 774, "This rule . . . we do not now construe . . . as applicable to the present situation." (Only Fourth Circuit Rule 10(8) refers to objections not made in the court below.)

Treatment of the question as one of general law by the Fifth and District Court of Columbia Circuits is therefore inescapable even under their own rules. It follows that there is a conflict between the Ninth Circuit on the one hand and the Fifth and District of Columbia Circuits on the other.

3. Besides, the scope of an appeal would vary, depending upon whether the appellate court flatly refused to notice plain error under any circumstances or noticed it in a proper case. The review is more flexible, and, the scope of review broader in the long run where the appellate court retains the right to notice plain error, though insufficiently assigned in the District Court. To say that each circuit can make its own rules on this question would make the right of appellate review vary from circuit to circuit. This would certainly be contrary to the plan under which the Rules of Procedure are authorized. 28 U.S.C. 2072, says in part:

> "Such rules shall not abridge, enlarge or modify any substantive right. . . ."

Whether the right of appeal be called "substantive" or "procedural", both the statute and the rules themselves indicate an intention to have federal rights uniform throughout the country. If the rules formulated

by the Supreme Court cannot vary substantive rights, much less, the rules of the Circuits. And the same must be true of the right of appellate review by whatever name it may be characterized. Respondent's suggestion that the questions reviewable on appeal may vary from circuit to circuit, is, we submit, contrary to the plan both of the statute and the rules.

4. On pages 10-12 of its reply respondent argues that plain error on the effect of the failure of the brake to work, should not be noticed because petitioner was allegedly impeached on the issue of damages. There is obviously no connection. We call attention to the point not specifically noted in our original petition, that the District of Columbia Circuit holds it will notice plain error for exactly the same reason as the Fifth—where the error goes to the central issue of the case. (*Montgomery v. Virginia Stage Lines*, 191 F.2d 770, 774.)

The writ of certiorari should issue as prayed.

Dated, San Francisco, California,
February 3, 1961.

Respectfully submitted,
ROBERT R. HEPPERLE,
GEORGE OESHAUSEN,
Attorneys for Petitioner.

(Appendix Follows.)

Fourth Circuit—Rule 10, subd. 8.

"Points not argued in the briefs will be deemed abandoned and may not be argued orally except by permission of the court. The court, however, in the interest of justice, may notice plain error apparent in the record, whether or not it has been argued in the briefs or made the subject of objection or exception in the court below."

Fifth Circuit—Rule 24, subd. 2.

"This brief shall contain, in order here stated—

. . .

"(b) A specification of the errors relied upon, which shall set out separately and particularly each error asserted and intended to be urged. Errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not specified."

District of Columbia Circuit—Rule 17. Printing of Records and Briefs; Contents of Briefs:

. . .

"(g) *Points Not Presented.* Points not presented according to the rules of the court, will be disregarded, though the court, at its option, may notice and pass upon a plain error not pointed out or relied upon. As amended to Sept. 9, 1958; June 20, 1960; Oct. 4, 1960."

(17(g) was formerly 17(i).)